

RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF JUDGE

Judges are presumed to be unbiased. A judge is not biased against a defendant just because the judge rules against the defendant.

The State of Arizona, by and through undersigned counsel, responds to the defendant's Motion for Change of Judge. The State's response is based upon the attached Memorandum of Points and Authorities.

FACTS:

The defendant has filed more than twenty motions since this matter has been scheduled for a new trial. Daily, the Maricopa County Attorney's office has received a motion. The defendant again urges what was previously litigated at defendant's first trial.

This Court has been more than tolerant with the defendant's zealousness and has granted relief on the several of the defendant's motions.

Although the defendant is representing himself *pro se*, he has been provided the assistance of advisory counsel, a paralegal, an expert, and an investigator. Now that this Court has denied his spurious motions, he contends this court is biased against him and that he is entitled to a change of judge for cause.

THE LAW:

Rule 10.1(a), Ariz. R. Crim. P., provides a change of judge for cause if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge.

To effect a hearing on the merits by the presiding judge, the defendant must file a motion "alleging specifically the grounds for the change." Rule 10.1(b), Ariz. R. Crim. Proc.; *State v. Eastlack*, 180 Ariz. 243, 883 P. 2d 999 (1994).

The defendant's motion fails to satisfy the requirements of *Eastlack* or Rule 10.1(b).

The defendant attributes this Court's failure to upgrade the standard paralegal's fee of \$15.00/hour to bias against him. However, this Court must comply with the fee standards allocated by Legal Contract Administer, John Rood.

As to this Court's ruling on defendant's Motion to Suppress, the defendant's failure to timely litigate this matter at his first trial constituted a waiver. *State v. Neese*, 126 Ariz. 499, 616 P. 2d 959 (App. 1980) He further had an opportunity to allege the failure to raise this issue later at his post-conviction relief hearing when he alleged ineffective assistance of counsel. Instead, the defendant waited until five years later, after the Justice Court had purged its files, to raise an issue which defendant's competent counsel would have automatically alleged if, in fact, the warrant had been defective.

At the suppression hearing, the court allowed the defendant to call witnesses and cross-examine the State's witnesses. Through defendant's unlimited examination of these witnesses and his own admissions, evidence established not only that a search warrant was executed, but also that defendant observed a copy along with the return left at his apartment. Why would a return be made out if the warrant was not properly issued by the Justice Court?

This Court did not abuse its discretion in denying the defendant's suppression motion nor was there a showing of bias on the part of the State. The defendant's allegations of bias are based on facts that are not under the control of Judge Hilliard. Approval of investigator fees, and the defendant's inability to obtain copies of transcripts, are not within the duties or obligations of this Court. The defendant has access to advisory counsel to assist him.

The defendant presumes that Judge Hilliard was biased on matters on which she

has had no opportunity to rule. Bare allegations of bias and prejudice, unsupported by factual evidence, are not sufficient to overcome the presumption of impartiality and do not require recusal. *State v. Carver*, 160 Ariz. 167, 173, 771 P. 2d 1382, 1388 (1989).

The Supreme Court of Arizona had held that a judge shall not be removed absent a showing of bias or prejudice. *State v. Greenway*, 170 Ariz. 155, 162, 823 P. 2d 22, 29 (1991); *State v. Fierro*, 166 Ariz. 539, 548, 804 P.2d 72, 81 (1990).

A trial judge is presumed to be free of bias and prejudice. *State v. McMurtrey*, 151 Ariz. 105, 108, 726 P. 2d 202, 205 (1986), *cert. denied*, 110 S.Ct. 3289 (1990). Therefore, the party seeking a judge's recusal is required to prove by a preponderance of the evidence that the trial judge was biased or prejudiced. *State v. Greenway*, 170 Ariz. 155, 162, 823 P. 2d 22, 29 (1991); *State v. Perkins*, 141 Ariz. 278, 286, 686 P. 2d 1248, 1256 (1984). Bias and prejudice means a hostile feeling or spirit of ill will towards one of the litigants. The fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved does not make the judge biased or prejudiced. *State v. Perkins*, 141 Ariz. 278, 286, 686 P. 2d 1248, 1256 (Ariz. 1984).

Here, the defendant's allegation for recusal is insufficient to even warrant a hearing, yet alone a basis for recusal of Judge Hilliard. The defendant's motion shows his animosity towards the Court system and this prosecutor. However, that is not grounds for a change of judge for cause pursuant to Rule 10.1, and this Court should summarily deny his motion.